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In The Supreme Court of the United States

MARK COCCHIOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has held that the coercive impact of a supplemental instruction encouraging a deadlocked federal criminal jury to reach a verdict must be judged "in its context and under all the circumstances." *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (per curiam). In a federal criminal prosecution, where the supplemental instruction given by the district court is not in and of itself coercive, must the court of appeals examine the context and circumstances in which it was given to determine whether the instruction to continue deliberating had a coercive effect?

2. This Court has long held that a trial court faced with a deadlocked jury must take into account "all the circumstances" before deciding whether there is a manifest necessity to declare a mistrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). In a federal criminal prosecution, where the district court has denied a defense motion for a mistrial, must the court of appeals examine the context and circumstances to determine whether requiring the jury to continue deliberating had a coercive effect, regardless of the instruction given?

LIST OF ALL PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States, Mark Cocchiola, and Steven Venechanos (a co-defendant at trial, whose appeal was consolidated with petitioner's). To petitioner's knowledge, Venechanos has not petitioned this Court for review.

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2. The decision of the Court below conflicts with this Court's longstanding precedent in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), by permitting a district court to decide there is no "manifest necessity" to declare a mistrial following notification by the jury that it was "hopelessly deadlocked," without first taking into account "all the circumstances" 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARK COCCHIOLA respectfully petitions this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Third Circuit filed on December 23, 2009, affirming his conviction and sentence in a federal criminal case.

OPINIONS BELOW

The Third Circuit's non-precedential Opinion (per Sloviter, J., with Jordan and Weis, JJ.) was filed on December 23, 2009; see *United States v. Cocchiola*, 2009 WL 5031367. App. 1-15. The trial court (Chesler, J., D.N.J.) wrote no opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction and sentence was filed and entered on December 23, 2009. A copy is included in the appendix. App. 1-15. Petitioner's timely petition for rehearing was denied on February 3, 2010. A copy is included in the appendix. App. 16-17. On May 4, 2010, under 09A1004, Justice Alito extended the time for filing this petition to and including June 3, 2010. The instant petition is filed within that extended deadline.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The issues raised in this petition do not turn on the interpretation of any constitutional provision or statute.

STATEMENT OF THE CASE

This petition arises from convictions after a trial on 38 counts charging conspiracy, bank, wire and mail fraud, and making false statements in reports required to be filed with the SEC. 18 U.S.C. §§ 371, 1344, 1343, 1341; 15 U.S.C. §§ 77x and 78ff(a).

a. Procedural History

On July 11, 2005, a grand jury in the District of New Jersey indicted Mark Cocchiola and Steven Venechanos on charges of conspiracy, fraud, and making false statement in documents filed with the SEC. Mr. Cocchiola was the CEO of Suprema Specialties, Inc., a New York corporation which manufactured and distributed Italian cheese products; Mr. Venechanos was Suprema's CFO.

Count 1 charged that Mr. Cocchiola, his co-defendant, and others conspired from in or about

1994 to in or about March 2002, in violation of 18 U.S.C. § 371, to commit bank fraud, contrary to 18 U.S.C. § 1344, mail fraud, contrary to 18 U.S.C. § 1341, wire fraud, contrary to 18 U.S.C. § 1343, and false and misleading statements to the SEC on quarterly and annual reports, contrary to 15 U.S.C. § 78ff(a). *Counts 2-18* charged both defendants with bank fraud, in violation of 18 U.S.C. §§ 1344 and 2. *Counts 19-23* charged that both defendants caused to be filed with the SEC four quarterly (10-Q) and one annual (10-K) report that contained inflated sales and assets figures, in violation of 15 U.S.C. § 78ff(a) and 18 U.S.C. § 2. *Counts 24-27* charged that the defendants made false and fraudulent statements in documents required to be filed with the SEC in connection with the issuance of securities, in violation of 15 U.S.C. §§ 77x and 78ff(a) and 18 U.S.C. § 2. *Counts 28-33* charged both defendants with wire fraud in violation of 18 U.S.C. § 1343. *Count 34* charged Mr. Cocchiola with wire fraud in violation of 18 U.S.C. §§ 1344 and 2. *Counts 35-38* charged both defendants with mail fraud in violation of 18 U.S.C. §§ 1341 and 2.

On October 10, 2006, the grand jury returned a 38-count superseding indictment which charged the same offenses originally charged in the July 11, 2005, indictment, but which changed the averments of some of the facts supporting the charges.

Trial before Stanley R. Chesler, U.S.D.J., and a jury, commenced on January 31, 2007. After 23 days of trial, the government rested on March 15. After

calling one witness, the defense rested its case that same day. On Friday, March 30, 2007, after five days of deliberation, the jury sent a note to the court which read in full:

> We the jury after five days of intense deliberation now find ourselves hopelessly deadlocked.
>
> Despite numerous discussions we have been locked into the same exact position for the past two days.

After the court denied the defendants' motion for a mistrial, it acceded to a request by the prosecution for a "*Fioravanti*" instruction,[1] and required the jury to continue its deliberations.[2] While the court advised

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[1] In *United States v. Fioravanti*, 412 F.2d 407, 421 n.32 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969) the Third Circuit suggested that a district court use the jury instruction suggested by W. Mathes and E. Devitt, Federal Jury Practice and Instructions, § 79.01 (1965), to urge a jury to continue its deliberations.

[2] The district court gave the following instruction:

> Members of the jury, we've received your note and I must tell you I have very seriously considered what you said in that note. I'm going to ask you to return to the jury room, however, and to deliberate further. I realize you're having difficulty reaching a unanimous verdict but that's not unusual and often after further discussion, jurors are able to work out their differences and agree.
>
> It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for

(Continued on following page)

the jury it did not "mean[ ] to rush or pressure [the jury] into agreeing on a verdict," it also warned them that it was in "no hurry" for them to reach a verdict. Just over an hour after the jury had returned to deliberate, the court dismissed them early for the week-end. The following Monday, April 2, 2007, after less than two hours of deliberations, the jury sent the court a note announcing that it had reached a verdict.

That year, Holy Week for Christians began on April 1 with Palm Sunday.[3] The Jewish holiday of Passover was scheduled to begin on April 3 (which means that the first day of observance would be the

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> yourself, but do so only after impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you're convinced it's erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because the opinion of your fellow jurors or for the mere purpose of reaching a verdict. Listen carefully to what the other jurors have to say and then decide for yourself if the government has proved the defendants' guilt beyond a reasonable doubt.
>
> What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.
>
> With that instruction, I would like you to return to the jury room. Thank you, ladies and gentlemen.

[3] *See* http://www.vatican.va/liturgical_year/holy-week/2007/index_en.htm

evening of April 2 – the day the jury returned its verdict).[4]

On June 13, 2007, after receiving several extensions, both defendants filed motions pursuant to Fed.R.Crim.P. 33 for a new trial. Defendant Venechanos' motion, in which defendant Cocchiola joined, asked the court for a new trial, alleging the court had erred when it required further deliberations after the jury had declared itself "hopelessly deadlocked." Following the argument of counsel at a September 24, 2007, hearing, the court denied the motion.

On March 27, 2008, the court sentenced Mr. Cocchiola to 180 months' (15 years) imprisonment. On appeal, the Third Circuit on December 23, 2009, affirmed petitioner's judgment of conviction and sentence. *United States v. Cocchiola*, 2009 WL 5031367 (non-precedential). App. 1-15. Rehearing was denied on February 3, 2010. App. 16-17.

b. Statement of Facts

Suprema Specialties was a publicly traded New York corporation based in Paterson, New Jersey, with business locations in Manteca, California, Ogdensburg, New York, and Blackfoot, Idaho. Suprema manufactured and distributed natural Italian cheeses. Its customers included some of the largest food

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[4] *See* http://www.when-is.com/passover-2007.asp

distributors in the United States as well as Sbarro, a national Italian restaurant chain. Mark Cocchiola was Suprema's CEO. His brother-in-law, Paul Lauriero, was Executive Vice President until his death in 2001. Steven Venechanos was the CFO.

The opinion of the court of appeals includes the following concise summary of facts underlying the offenses charged in the superseding indictment:

> The superseding indictment details an intricate scheme in which defendants, along with others, inflated Suprema's sales and misrepresented its inventory through, among other things, fraudulent accounting practices and mislabeled products. As a result, Suprema was able to borrow large sums of money from Fleet Bank (now Bank of America) and the other banks that participated in its "revolving loan agreements." Venechanos App. at 57.
>
> In addition, defendants made false representations to the Securities and Exchange Commission ("SEC") in the annual and quarterly reports that Suprema filed. These misrepresentations were also passed on to investors and other members of the public through press releases. Lastly, in connection with a November 2001 Suprema stock offering, defendants made false representations to the SEC, some of which were disseminated to potential investors.

2009 WL 5031367 *1. App. 2-3.

At trial, the defense conceded that the banks and investors had been defrauded and that false statements were made on documents required by the SEC, but argued that Mark Cocchiola was unaware of the fraud and false statements and that he and Suprema were victims of a "bust-out" scheme in which Paul Lauriero secretly conspired with criminals to suck the life-blood out of the company and drive it into bankruptcy. The defense asserted that Lauriero wanted to harm Mr. Cocchiola and Suprema as revenge for the way Mark Cocchiola treated him after Lauriero had cheated on his wife, who was Mr. Cocchiola's sister. Lauriero's widow, Grace Lauriero, testified as a defense witness that Paul Lauriero and Mark Cocchiola had had a falling out after Mr. Cocchiola discovered the affair. At first, Lauriero was forced out of Suprema. Even though Mr. Cocchiola eventually allowed Lauriero to return to Suprema, their relationship remained strained. The defense asserted that to get revenge against Mr. Cocchiola, Lauriero allowed mobsters to set up the bust-out scheme to destroy the company and harm Mr. Cocchiola, its biggest shareholder.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the District of New Jersey had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court

of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. The circuits are divided on whether, in a federal criminal prosecution, the court of appeals must consider the coercive impact an otherwise proper *Allen* charge has under the particular circumstances of the case in deciding whether the defendant is entitled to a new trial.

The court of appeals below rejected the petitioner's claim that the district court had abused its discretion when it refused to declare a mistrial based on the jury's report that it was "hopelessly deadlocked," and instead instructed the jury to continue its deliberations. The Third Circuit held, without regard to the circumstance of the case, that the district court's actions could not have been error since the court's instruction, viewed in isolation, was not coercive. *United States v. Cocchiola,* 2009 WL 5031367 *3. App. 8. Although that ruling was consistent with the Third Circuit's decision in *United States v. Eastern Medical Billing,* 230 F.3d 600 (3d Cir. 2000), it conflicts with decisions from nearly every other circuit, and with this Court's most pertinent precedent. Accordingly, certiorari should be granted.

In *Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam), this Court used its supervisory power

over the federal courts to hold that courts of appeals must look to "all the circumstances" to determine whether an *Allen* charge is coercive.[5] After the jury in *Jenkins* had deliberated for slightly more than two hours, it sent the trial judge a note in which it informed the court that it was unable to reach a verdict "'on both counts because of insufficient evidence.'" 380 U.S. at 446. The judge responded by telling the jury, "'You have got to reach a decision in this case.'" *Id.* After reviewing the record, this Court "conclude[d] that *in its context and under all the circumstances* the judge's statement had [a] coercive effect," and "reversed and remanded for a new trial." *Id.* (emphasis added).

The Third Circuit has interpreted *Jenkins* to mean that in reviewing a challenge to an *Allen* charge, it does not have to look beyond the language of the instruction to the jury unless that language was itself, standing alone, potentially coercive. In that situation, the Third Circuit looks beyond the language of the instruction for evidence in the record that it had no coercive impact. In *United States v.*

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[5] In *Allen v. United States*, 164 U.S. 492 (1896), this Court approved the practice of a trial court's giving a deadlocked jury a supplemental instruction to encourage further deliberations in hopes of its reaching a verdict – so long as that verdict "represent[s] the opinion of each individual juror," 164 U.S. at 501, *i.e.*, so long as the instruction is not coercive. In this petition, the term "*Allen* charge" is used not only to refer to an instruction similar to the one approved in *Allen*, but also to variations on that instruction.

Eastern Medical Billing, 230 F.3d 600 (3d Cir. 2000), for example, after concluding that the *Allen* charge in that case did not conform to the Third Circuit's model instruction, and was therefore potentially coercive in itself, the court looked to the context in which it was given and other circumstances of the case to determine whether the potentially coercive instruction was harmless. 230 F.3d at 614. The court considered two things. First, it noted that the evidence was "not overwhelming." Second, it noted that the jury had deliberated for four hours after receiving the *Allen* charge before returning a verdict. *Id.* The court concluded that neither of these factors made the potentially coercive language harmless, *id.*, and therefore remanded for a new trial. *Id.* at 615.

The Third Circuit followed the same practice in *United States v. Graham*, 758 F.2d 879, 883 (3d Cir.), *cert. denied*, 474 U.S. 901 (1985), and *Government of the Virgin Islands v. Hernandez*, 476 F.2d 791, 883 (3d Cir. 1973). In *Graham*, after the court concluded on plain error review that the *Allen* charge given was potentially coercive, it conducted an "independent review of the entire record" and concluded "that no manifest injustice resulted from the court's instruction." In *Hernandez*, which also involved an *Allen* charge with potentially coercive language, the court came to the opposite conclusion, since the record revealed no "extraordinary circumstances" that would make the defective *Allen* charge not coercive.

But when the Third Circuit considers an appeal involving an *Allen* charge whose language in and of itself is not coercive, the court does not examine the context and circumstances of the case for coercive effect. The court made it clear in *Eastern Medical Billing* that the reason it had included an example of a non-coercive instruction in *United States v. Fioravanti*,[6] with the suggestion that in the future it be used by district courts confronted by deadlocked juries, was to avoid the "problems raised by attempting to determine whether coercion occurred in each case." 230 F.3d at 608. The court also noted in that case that it had intended the "rule" it announced in *Fioravanti* "as 'a prophylactic device to eliminate future vexation.'" *Id.* (quoting *Fioravanti,* 412 F.2d at 420).[7] In other words, the Third Circuit has interpreted this Court's supervisory ruling in *Jenkins* to mean that it need not look for evidence of coercion beyond the language of the charge given by the district court *unless* that language, standing alone, is itself potentially coercive. That is precisely the approach the Third Circuit took in this case. As the court explained:

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[6] *See* 412 F.2d at 420 n.32.

[7] The "rule" announced in *Fioravanti* was that in the future, an instruction to a deadlocked jury which "direct[s] a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his" would be considered error. To help courts follow this "rule," the Third Circuit included a proposed instruction which complied with it.

> The supplemental instruction the District Court gave was in essence identical to Third Circuit Model Criminal Jury Instruction § 9.05. That model instruction was drafted after *Fioravanti* and takes into consideration the concerns regarding jury coercion this court articulated in that case. *See United States v. Brennan*, 326 F.3d 176, 193 (3d Cir. 2003) (holding that a supplemental instruction similar to that in the instant case did not "even [come] close to being coercive.").

United States v. Cocchiola, 2009 WL 5031367, *3 (3d Cir. Dec. 23, 2009). App. 8.

Unlike the Third Circuit, the First, Second, and Fourth through Eleventh Circuits all examine the record for evidence of a potential coercive effect, even where the *Allen* charge given, considered in isolation, is not coercive. In *United States v. Vanvliet*, 542 F.3d 259, 270 (1st Cir. 2008), for example, even though there was nothing coercive about the *language* of the *Allen* charge given in that case, the First Circuit did not end its analysis with a review of the language of the instruction. The court concluded the *Allen* charge had no coercive effect only *after* it had looked to strength of the government's case and the fact that the jury deliberated more than two hours following the *Allen* charge before returning a verdict.

The other circuits follow a similar practice. See *United States v. Robinson*, 560 F.2d 507, 517-18 (2d

Cir. 1977) (en banc) (fact that jury deliberated for three and four hours following two proper *Allen* charges before reaching a verdict shows they had no coercive effect), *cert. denied,* 435 U.S. 905 (1978); *United States v. Cropp,* 127 F.3d 354, 360 (4th Cir. 1997) (fact that jury deliberated seven hours after receiving proper *Allen* charge shows no coercive impact), *cert. denied,* 522 U.S. 1098 (1998); *United States v. Allard*, 464 F.3d 529, 535-36 (5th Cir. 2006) (appellant failed to offer any reason why otherwise proper *Allen* charge could have had coercive impact on jury); *United States v. Brika*, 416 F.3d 514, 521-22 (6th Cir. 2005) (fact that jury remained deadlocked on one count even after proper *Allen* charge shows no coercive effect), *cert. denied,* 546 U.S. 1207 (2006); *United States v. Fouse,* 578 F.3d 643, 653 (7th Cir. 2009) (two hour duration of deliberations following *Allen* charge not indicative of coercion where jury acquitted defendant on one count following *Allen* charge); *United States v. Ybarra*, 580 F.3d 735, 740 (8th Cir. 2009) ("jury acquitted on one count, convicted on another, and remained deadlocked on a third, thus indicating that it was not coerced" by proper *Allen* charge); *United States v. Beattie*, 613 F.2d 762, 765-66 (9th Cir.) (nothing in record, including jury deliberations for 3.5 hours following proper *Allen* charge, indicates any coercion), *cert. denied,* 446 U.S. 982 (1980); *United States v. Ailsworth,* 138 F.3d 843, 851-52 (10th Cir.) (fact that jury continued to deliberate for two more days and was still not able to reach unanimous verdicts on all counts shows proper *Allen* charge had no coercive

effect), 525 U.S. 896 (1998); *United States v. Woodward*, 531 F.3d 1352, 1364 (11th Cir. 2008) (fact that jury deliberated four hours after receiving proper *Allen* charge evidence of no coercive effect, where jury deliberated longer following *Allen* charge than before).

Had the Third Circuit in this case followed the rule used by the other circuits, it would likely have reached a different conclusion. Although the petitioner's brief in the court of appeals raised several reasons why a normally appropriate instruction was coercive under the particular circumstances of this case, the court of appeals failed even to acknowledge the petitioner's argument. *Cf. Early v. Packer*, 537 U.S. 3, 9 (2002) (per curiam) ("The contention that the California court 'failed to consider' facts and circumstances that it had taken the trouble to recite strains credulity"). The only reason the Third Circuit gave for refusing to consider the circumstances which made the otherwise proper *Allen* charge coercive, was that the "supplemental instruction the District Court gave was in essence identical to Third Circuit Model Jury Instruction – Criminal § 9.05." 2009 WL 5031367 *3. App. 8.

The decision of the Third Circuit in this case brings into focus a problem of national importance – the impact the proliferation of model jury instructions has had on the willingness of the courts of appeals to engage in the detailed case and fact-specific inquiries called for by this Court's precedent when a district court has given the circuit in question's "model" *Allen*

charge. To date, nine United States Courts of Appeals have adopted model jury instructions, each of which includes a slightly different *Allen* charge.[8] Although each set of model instructions makes it clear that an individual model instruction is not necessarily appropriate under the facts of a particular case, the very existence of a model *Allen* charge, although normally a helpful thing, can sometimes lead to an unintended coercive effect, as it did in this case. In this case, the district court included in its *Allen* charge an instruction for the jury to "[t]ake as much time as you need to discuss things. There is no hurry" – simply because that language is in the Third Circuit's model instruction.

While that instruction is normally helpful in avoiding the potential for coercion, in this case, where the jury had already deliberated for five full days, the last two in a deadlock, the court's instruction to "[t]ake as much time" as it needed, and that there was "no hurry" must have sounded like a threat to force it to sit as long as it took to force a verdict – a

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[8] *See* First Circuit Pattern Jury Instructions – Criminal ¶ 6.06 (1998); Third Circuit Model Jury Instructions – Criminal ¶ 9.05 (2009); Fifth Circuit Pattern Jury Instructions – Criminal ¶ 1.45 (2001); Sixth Circuit Pattern Jury Instructions – Criminal ¶ 9.04 (2009); Seventh Circuit Federal Jury Instructions – Criminal ¶ 7.06 (1999); Eighth Circuit Manual of Model Jury Instructions – Criminal ¶ 10.02 (2007); Ninth Circuit Manual of Model Jury Instructions – Criminal ¶ 7.7 (2003); Tenth Circuit Pattern Jury Instructions – Criminal ¶ 1.42 (2005); and Eleventh Circuit Pattern Jury Instructions – Criminal Trial Instr. 7 (2003).

classic tactic of coercion. The Third Circuit refused to consider the coercive effect this language had in this case, simply because it was in its model instruction. Had the Third Circuit model *Allen* charge been more like pattern instructions from the First, Seventh, or Ninth Circuits (which do not include such language), the Third Circuit would have considered its coercive impact in this case had the district court added it.

The potentially coercive circumstances discussed in the petitioner's brief on appeal also included the fact that in 2007, not only did Holy Week for Christians begin on April 1 with Palm Sunday, but the Jewish holiday of Passover was scheduled to begin on April 3 (which means that the first day of observance would be the evening of April 2 – the day the jury returned its verdict). In other words, the implied threat that the jury would be required to deliberate through these important religious holidays added to its potentially coercive effect. The fact that the jury returned a verdict after less than two hours of deliberation following the court's instruction, when viewed in the light of these other factors, is evidence that the instruction in fact had the feared coercive impact. See *United States v. United States Gypsum Company,* 438 U.S. 422, 462 (1978) ("swift resolution" of case by jury following questionable action by trial judge evidence of coercive effect); *Rogers v. United States,* 422 U.S. 35, 40-41 (1975) (quick verdict following improper instruction evidence of coercive impact).

For these reasons, this Court should grant this petition to resolve this conflict and to bring the Third Circuit in line with the other Courts of Appeals.

2. The decision of the Court below conflicts with this Court's longstanding precedent in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824), by permitting a district court to decide there is no "manifest necessity" to declare a mistrial following notification by the jury that it was "hopelessly deadlocked," without first taking into account "all the circumstances."

This Court has long held that district courts must take into account "all the circumstances" before determining whether to give a deadlocked jury a supplemental instruction or to declare a mistrial. See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (discharging a jury is appropriate when "taking all the circumstances into consideration, there is a manifest necessity" to do so). Although the circumstances of this case created a manifest necessity for a mistrial, the district court ignored those circumstances and denied the defendant's motion for one. This Court should grant certiorari to bring this case in compliance with *Perez* and to exercise its supervisory powers over the federal appellate courts to instruct them on the circumstances under which a district court abuses its discretion by failing to grant a defense motion for mistrial based on a hung jury.

A deadlocked jury is the classic example of "manifest necessity" that requires a mistrial. *Renico v. Lett*, 559 U.S. ___, 2010 WL 1740525 *6 (May 3, 2010) (citing *Arizona v. Washington*, 434 U.S. 497, 510 (1978), and *Downum v. United States*, 372 U.S. 734, 736 (1963)). See also *Yeager v. United States*, 557 U.S. ___, 129 S.Ct. 2360, 2366 (2009); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 121 (2003); *Richardson v. United States*, 468 U.S. 317, 323-324 (1984) (citing *United States v. Perez*). While reviewing courts must accord "great deference" to a district court's decision to grant a mistrial based on jury deadlock, *Renico v. Lett*, 559 U.S. ___, 2010 WL 1740525 *6 (citing *Arizona v. Washington*, 434 U.S. at 510), that deference "disappears" whenever "the trial judge has failed to exercise the 'sound discretion' entrusted to him," *Washington*, 434 U.S. at 510 n.28. That is what happened in this case when the district court failed to take into account the circumstances which made it coercive for the court to require the jury to engage in further deliberations after it had declared itself "hopelessly deadlocked." The court of appeals ignored these circumstances. This Court should grant certiorari to bring this case into compliance with *United States v. Perez* and its progeny over nearly two centuries.

Although it is clear that when a court fails to exercise "sound discretion" in deciding whether to declare a mistrial based on jury deadlock, that decision is not entitled to deference, this Court has never explained how a reviewing court should determine

when a trial court has used "sound discretion." The Court recently decided a case in which there was substantial evidence that the state trial judge did not exercise "sound discretion" in declaring a mistrial, but did not explore the limits of that discretion, because of the limited review available in a case arising under federal habeas corpus jurisdiction.

In *Renico v. Lett*, 559 U.S. ___, 2010 WL 1740525 (May 3, 2010), a defendant had been convicted in a second trial after the judge had earlier *sua sponte* declared a mistrial based on her perception that the jury had been unable to reach a verdict. In that case, after the jury had been deliberating less than two full days, it sent the court a note in which it asked what would happen if the jury could not come to an agreement. Although the note did not say the jury had actually reached an impasse, the judge called the jury into the courtroom and asked the foreperson whether there was a "disagreement as to the verdict." When the foreperson responded there was, the judge asked her whether the jury would be able to reach a unanimous verdict. When the foreperson hesitated to answer that question, the court required a "yes or no" answer. When the foreperson answered "no," the judge immediately declared a mistrial. *Id.* *4.

Under these circumstances, the Michigan Court of Appeals declined to defer to the judgment of the trial court and held that under these circumstances there was no "manifest necessity" to declare a mistrial and therefore held the second trial barred by the Double Jeopardy Clause. *Id.* *4. The Michigan

Supreme Court disagreed with the Michigan Court of Appeals, concluding that the trial judge *had* exercised "sound discretion." *Id.* *4. On habeas review, the United States District Court for the Eastern District of Michigan concluded that the Michigan Supreme Court's ruling was "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), and granted the writ. *Id.* *5. A divided panel of the Sixth Circuit affirmed. *Id.*

This Court reversed, but not because it necessarily agreed with the Michigan Supreme Court that the trial court had in fact exercised "sound discretion" when it declared a mistrial. The question the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), required this Court to answer was whether the decision of the "Michigan Supreme Court that there was no abuse of discretion was 'an unreasonable application of . . . clearly established Federal law.' § 2254(d)(1)." 2010 WL 1740525 at *5. In addressing that question, the Court took care to note that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* *5 (internal quotation omitted; emphasis in original). *See also id.* *8 n.3 ("It is not necessary for us to decide whether the Michigan Supreme Court's decision – or, for that matter, the trial judge's declaration of a mistrial – was right or wrong. The latter question, in particular, is a close one."). While this Court did not decide whether the trial court in *Lett* had in fact abused its

discretion, it acknowledged that that discretion was not "absolute." The Court "made clear that if the record reveals that the trial judge has failed to exercise the sound discretion entrusted to him, the reason for such deference by an appellate court disappears." *Id.* *7 (internal quotation and bracketed insert omitted).

Had *Lett* decided the Michigan Supreme Court's ruling had been an "unreasonable application of . . . clearly established Federal law," the question would still have remained whether a federal district court conducting a criminal trial should be held to a higher standard. When a jury informs a federal court that it has reached an impasse, the court must balance the interests of the defendant in having the case decided in one proceeding with the coercive potential of requiring further deliberations. *Renico v. Lett*, 559 U.S. ___, 2010 WL 1740525 *11 (accused's interest in a single proceeding must yield to threat of jury coercion); *Arizona v. Washington*, 434 U.S. at 516 (court must consider defendant's interest in a single proceeding before declaring a mistrial). When the attorney for the defendant has made the judgment that requiring further deliberations would prejudice the defendant by potentially coercing a verdict by a jury that may not be in agreement, the balance should shift to favoring the declaration of a mistrial. This Court should grant certiorari to exercise its supervisory power over the federal judiciary to require appellate courts to give less deference to the decision of a trial court under these circumstances so

as to ensure that federal criminal trials are "conducted in a manner consistent with basic notions of fairness." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987) (discussing use of Court's supervisory powers). See also *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974) (in exercising its supervisory powers, Court may require standard of fairness in federal trials higher than that minimally mandated in the states by Due Process).

In this case, there was ample reason why denying the defense motion for mistrial and instead requiring the jury to deliberate further was likely to produce a coerced verdict. The first was the unusual and emphatic nature of the note:

> We the jury after five days of intense deliberation now find ourselves hopelessly deadlocked.
>
> Despite numerous discussions we have been locked into the same exact position for the past two days.

Defense counsel immediately moved for a mistrial, noting that it was unusual for a jury that had been in "intense deliberations" for five days, and deadlocked for the last two of them, not to have sent an earlier note requesting guidance from the court. Rather than

poll the jury to determine whether further deliberations might be productive,[9] the trial court simply denied the motion for mistrial, and informed counsel that it would give the jury an *Allen* charge. The danger of forcing a coerced verdict under these circumstances was particularly acute in this case given the fact that in 2007, not only did Holy Week for Christians begin on April 1 with Palm Sunday (the day before the jury reconvened to deliberate following the *Allen* charge), but the Jewish holiday of Passover was scheduled to begin on April 3 (which means that the first day of observance would be the evening of April 2 – the day the jury reconvened to deliberate following the *Allen* charge). See, *e.g.*, *United States v. Graham*, 758 F.2d 879, 887-89 (3d Cir. 1985) (Higginbotham, J., dissenting) (discussing coercive impact on jury from impending Jewish holiday of Yom Kippur).

The court of appeals disregarded *all* of these factors and failed even to address whether the district court abused its discretion by not granting the petitioner's motion for a mistrial. This Court has previously exercised its supervisory powers over the federal courts to require mistrials where a judge's instruction, in the context of the circumstances of the case, had a coercive effect. In both *Jenkins v. United States*, 380 U.S. at 446 (1965) (per curiam), and *United States v. United States Gypsum Company*, 438

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[9] See *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1987) (poll to determine whether further deliberations would be useful is not coercive).

U.S. at 462, this Court exercised its supervisory powers over the federal courts to require a new trial where, under the circumstances of the case, the trial court's actions had a coercive effect. See *Early v. Packer*, 537 U.S. 3, 10 (2002) (per curiam) (noting that decisions in *Jenkins* and *U.S. Gypsum* were exercises of the Court's supervisory powers). The Court should grant the writ in this case to now consider the circumstances under which a district court's denial of a defense motion for mistrial after a jury had become "hopelessly deadlocked" requires a federal appellate court to exercise its supervisory powers and order a new trial.

CONCLUSION

For the foregoing reasons, petitioner MARK COCCHIOLA prays that this Court grant his petition for a writ of certiorari, and vacate the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction and sentence.

Respectfully submitted,

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May 26, 2010

2009 WL 5031367

United States Court of Appeals,
Third Circuit.
UNITED STATES of America
v.
Mark COCCHIOLA, Appellant.
United States of America
v.
Steven Venechanos, Appellant.
No. 08-1976.

Submitted Under Third Circuit LAR 34.1(a)
Dec. 14, 2009.
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On Appeal from the United States District Court for the District of New Jersey (D.C. Nos. 2-05-cr-00533-1, 2-05-cr-00533-2), District Judge: Honorable Stanley R. Chesler. George S. Leone, Esq., John F. Romano, Esq., Office of United States Attorney, Newark, NJ, for United States of America.

James H. Feldman, Jr., Esq., Ardmore, PA, for Appellant Cocchiola.

Before SLOVITER, JORDAN and WEIS, Circuit Judges.

OPINION

SLOVITER, Circuit Judge.

Appellants Mark Cocchiola and Steven Venechanos challenge procedural aspects of their criminal trial in which they were convicted by a jury of conspiring to

commit and committing multiple financial crimes. Cocchiola also challenges the sentence he received from the District Court. We will affirm.[1]

I.

Cocchiola and Venechanos ("defendants") were key players in Suprema Specialties, Inc. ("Suprema"), a company that manufactured and processed cheese for sale to supermarkets, other retail establishments, and food service industry distributors. Suprema was a New York corporation with headquarters in Paterson, New Jersey, and with wholly-owned subsidiaries in several locations throughout the United States.

The superseding indictment details an intricate scheme in which defendants, along with others, inflated Suprema's sales and misrepresented its inventory through, among other things, fraudulent accounting practices and mislabeled products. As a result, Suprema was able to borrow large sums of money from Fleet Bank (now Bank of America) and the other banks that participated in its "revolving loan agreements." Venechanos App. at 57.

In addition, defendants made false representations to the Securities and Exchange Commission

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[1] The District Court had jurisdiction under 18 U.S.C. § 3231. This court has jurisdiction over the challenges to defendants' convictions under 28 U.S.C. § 1291, and over Cocchiola's challenge to his sentence under 18 U.S.C. § 3742(a).

("SEC") in the annual and quarterly reports that Suprema filed. These misrepresentations were also passed on to investors and other members of the public through press releases. Lastly, in connection with a November 2001 Suprema stock offering, defendants made false representations to the SEC, some of which were disseminated to potential investors.

Approximately three months after this stock offering, Suprema filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, which was soon converted to a Chapter 7 liquidation. Bank of America filed documentation to prove that it lost over $75 million from the revolving loan agreement. Suprema's investors were also victims of the scheme, as Suprema stock became almost worthless after the company liquidated.

The Government charged defendants with conspiracy, seventeen counts of bank fraud, nine counts of making false statements in reports required to be filed with the SEC, six counts of wire fraud, and four counts of mail fraud. Cocchiola was charged with an additional count of wire fraud.

Both defendants pled not guilty and proceeded to trial. The jury heard twenty-two days of testimony and convicted both defendants on all counts. The District Court sentenced Venechanos to 96 months imprisonment and Cocchiola to 180 months imprisonment. Defendants jointly challenge several rulings

made at trial. Cocchiola challenges his sentence.[2] Also, Venechanos asserts that he was deprived of a fair trial due to misconduct by the prosecutors.[3]

II.

Because we write primarily for defendants, who are well aware of the relevant facts, we refer to those facts only as necessary in discussing their contentions. Defendants contend that they were denied a fair trial when the District Court granted the Government's motion in limine to exclude defendants' expert witness, Frederick Martens, who was to testify on "(1) the structure of an organized crime family within the Italian mafia, (2) the elements of a mafia bust-out scheme, and (3) [a co-conspirator's] connection to the

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[2] Venechanos states in his brief that he "joins with and incorporates each and every issue contained in the . . . brief submitted on behalf of . . . Cocchiola." Venechanos Br. at 48. However, he did not submit a transcript from his sentencing hearing, his PSR, or a reply brief with a discussion of sentencing. Assessing whether he may be entitled to re-sentencing is impossible on the record before us. *See United States v. Harris*, 932 F.2d 1529, 1533 (5th Cir.1991) (defendants cannot join arguments of co-defendants on appeal where determinations are fact specific as to each). Accordingly, we agree with the Government that Venechanos waived his ability to challenge his sentence.

[3] Cocchiola filed a letter with this court under Federal Rule of Appellate Procedure 28(i), in which he joined most of the assertions in Venechanos' brief. Cocchiola declined, however, to join Venechanos' arguments concerning prosecutorial misconduct.

Bonanno crime family." Cocchiola App. at 119-20. Martens' proposed testimony would have explained to the jury the way in which "bust-out" schemes commonly involve infiltration by criminals into "position[s] of authority within a legitimate company to implement a fraudulent billing and invoicing scheme" with the assistance of various shell companies, for the purpose of looting the assets of the company and driving it into bankruptcy. Cocchiola App. at 120. Defendants assert that this testimony would have been significant because the fraud that occurred at Suprema was a classic "bust-out" scheme perpetrated without the knowledge of Cocchiola and Venechanos. Defendants argued that expert testimony about "bust-out" schemes generally would be "helpful to the jury in terms of understanding" that defendants were ignorant of the wrongdoing at Suprema. Cocchiola App. at 157.

The Government filed a motion in limine to exclude Martens' testimony, arguing that there was no evidentiary basis to connect the case to organized crime, and that, in any event, testimony about "bust-out" schemes was irrelevant to the ultimate issue, which was defendants' knowledge of and participation in the fraudulent scheme. The Government further argued that even if Martens' proposed testimony were relevant, its probative value would be substantially outweighed by its potential to confuse the jury.

The District Court granted the Government's motion in limine, referring to Federal Rule of Evidence 702. It first determined that there was

"insufficient evidence and, indeed, no admissible evidence which establishe[d] any relationship between the subject matter of [the] lawsuit and organized crime." Cocchiola App. at 3-4. The District Court also concluded that Martens' proposed testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue," Cocchiola App. at 6, and that such testimony would likely confuse the jury.

Defendants argue that the District Court's ruling was erroneous, and that the unjustness of the decision was enhanced when the Government "exploited [the] lack of evidence," Cocchiola Br. at 25, by stating to the jury in its rebuttal summation, "[t]here's . . . no evidence really to tell us what a bust-out is. . . ." Cocchiola App. at 360. The admission of expert testimony vel non falls within the broad discretion of the trial court, and we will reverse only for an abuse of discretion. *See Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir.2008).

We have no basis to disturb the District Court's ruling. We agree with the District Court that a description of "bust-out" schemes generally would be unlikely to affect whether the jury believed defendants were either guilty participants in such a scheme or unwitting scapegoats. Also, the District Court's concern with the potential for confusion that testimony about the mafia could engender was reasonable.

The argument that the Government exploited the lack of evidence on "bust-out" schemes is also unavailing because even without Martens' testimony, defendants provided evidence and vehemently argued that defendants may have been victims of a "bust-out" scheme. For example, defendants made clear from the outset that they intended to prove that the fraud was hidden from them as much as it was hidden from the banks and investors. Defendants repeatedly questioned witnesses about the roles of others in the fraud. After hearing such evidence and argument, the jurors were qualified to determine, without the aid of expert testimony, whether the fraud was driven by outsiders and thus whether defendants' theory of the case was credible.

Defendants next contend that the District Court abused its discretion in giving a *Fioravanti* instruction in response to a note from the jurors to the Court stating that, after deliberating for five days, they were "hopelessly deadlocked."[4] Cocchiola App. at 386.

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[4] In *United States v. Fioravanti*, this court held that a jury instruction is unduly coercive when it encourages jury members who are in the minority during deliberations to reconsider their views in light of their minority status. 412 F.2d 407, 416 (3d Cir.1969).

We instead urged district courts to employ the following charge:

> It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of

(Continued on following page)

After receiving the note, the District Court summoned the parties to the courtroom to discuss their respective positions. Defense counsel moved for a mistrial. They argued that the note made clear "that further deliberations would not move [the jury's] position[ ]." Cocchiola App. at 11.

Unsurprisingly, the Government disagreed. It suggested in lieu of declaring a mistrial that the Court give a supplemental *Fioravanti* charge, which the Court did. Even if defense counsels' failure to object was not a waiver of their objections, *see United States v. Graham*, 758 F.2d 879, 883 (3d Cir.1985), defendants have no cause for complaint. The supplemental instruction the District Court gave was in essence identical to Third Circuit Model Criminal Jury Instruction § 9.05. That model instruction was drafted after *Fioravanti* and takes into consideration the concerns regarding jury coercion this court articulated in that case. *See United States v. Brennan*, 326 F.3d 176, 193 (3d Cir.2003) (holding that a supplemental instruction similar to that in the instant case did not "even [come] close to being coercive.").

> the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Id. at 420 n. 32 (quoting W. Mathes & E. Devitt, *Federal Jury Practice and Instructions*, § 79.01 (1965)).

Both defendants challenge the District Court's "willful blindness" instruction which allowed the jury to convict if it believed that the "evidence prove[d] beyond a reasonable doubt that a defendant deliberately closed his eyes to what would otherwise have been obvious to him." Venechanos App. at 127. Defendants contend that there was insufficient evidence to warrant such an instruction and that the government's theory was that defendants were guilty based on their direct knowledge of and participation in Suprema's fraudulent activities. The defendants further assert that giving such an instruction erroneously "permits a civil standard of mental state such as negligence" to suffice for a criminal conviction. Venechanos Br. at 39. We disagree.

The Government did seek to prove actual knowledge by defendants, but it also presented evidence that could allow a jury to infer that defendants deliberately ignored the fraudulent dealings occurring at Suprema. The record before us thus contains sufficient evidence to warrant a willful ignorance instruction. Moreover, the Court's instruction cautioned the jury not to convict based on a mens rea of negligence.[5]

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[5] The instructions included the following:

> [Y]ou may not find that a defendant knew that these representations about Suprema were false if you find only that the defendant . . . should have known that these representations were false or that a reasonable person would have known of a high probability of this

(Continued on following page)

In another claim that the District Court abused its discretion in connection with the jury instructions, defendants challenge the failure to give their requested instruction that if the jury found that they acted in subjective good faith, they must be found not guilty. The Government objected to this requested instruction, arguing that the instructions as a whole incorporated a description of the mens rea the jury was required to find in order to convict. The District Court agreed, finding that "in the context of this case" giving a good faith instruction would not "make [the necessary intent] any clearer, and in fact, [would] end[ ] up being pure surplus." Supp.App. at 3728a-27. We agree.

In *United States v. Leahy*, we addressed this issue and held that "a district court does not abuse its discretion in denying a good faith instruction where the instructions given already contain a specific statement of the government's burden to prove the elements of a 'knowledge' crime." 445 F.3d 634, 651 (3d Cir.2006) (citing *United States v. Gross*, 961 F.2d 1097, 1102-03 (3d Cir.1992)). The jury instructions in this case defined "knowingly" – clarifying that acts

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> fact. It is not enough that a defendant may have been stupid or foolish or may have acted out of inadvertance or accident. You must find that the defendant . . . was actually aware of a high probability that these representations about Suprema were false, deliberately avoided learning about it and did not actually believe they were true.

Venechanos App. at 128

done "because of . . . ignorance or mistake" could not suffice for a conviction. Supp.App. at 4235-36. Because this issue was squarely presented in *Leahy*, the District Court's refusal to provide a "good faith" instruction under governing precedent was not an abuse of discretion.

Next, Venechanos argues that he was deprived of a fair trial because the Government did not provide defendants material from the hard drive of one of the Government's most important witnesses, Arthur Christensen. Christensen had deleted "anything that was personal in [his] computer" in mid-December 2001 – more than a month before the Government obtained access to his computer. Supp.App. at 1771. Venechanos argues that the prosecution had an affirmative obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to expend the resources necessary to "see what exactly had been deleted" so as to determine whether it contained exculpatory evidence.[6] Venechanos Br. at 29. This contention lacks merit.

Brady and its progeny establish that a criminal defendant's due process rights are violated when prosecutors fail to provide defense counsel with evidence that is material either to the defendant's guilt

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[6] Venechanos complains that the Government's failure to disclose whatever evidence was deleted from Christensen's hard drive hindered his ability to cross examine Christensen. But this is unconvincing because Venechanos' counsel questioned Christensen at length about deleting files from his hard drive.

or punishment. *See Brady*, 373 U.S. at 87; *see also United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Perdomo*, 929 F.2d 967, 969-70 (3d Cir.1991). However, the requirement that the Government disclose the material evidence in its possession is fundamentally different from placing an affirmative obligation on prosecutors to ferret out any potentially exculpatory evidence. *Cf. United States v. Graham*, 484 F.3d 413, 416-18 (6th Cir.2007) (government has no duty to investigate evidence under control of its cooperating witness); *United States v. Merlino*, 349 F.3d 144, 154 (3d Cir.2003) (no duty to learn information possessed by governmental agencies with no involvement in investigation). Venechanos did not seek the personal materials deleted from Christensen's computer before or during trial, and prosecutors had no reason to believe such materials would have been relevant to Venechanos' guilt or punishment. Indeed, Christensen testified that all the deleted material was personal and Venechanos never explained the way in which this evidence may have been exculpatory. *See, e.g., United States v. Rouse*, 410 F.3d 1005, 1010 (8th Cir.2005) (holding that there is no *Brady* violation where "defendants can only speculate" that the withheld evidence contained exculpatory information). Under these circumstances, we decline to establish the novel proposition that *Brady* requires the Government to forensically reconstruct material deleted from a hard drive before prosecutors have access to the computer.

We turn to Cocchiola's challenge to the District Court's calculation of his sentence. Cocchiola argues that the District Court erred in imposing an eighteen-level upward adjustment based on the finding that the victims' monetary loss associated with his offenses amounted to over $80 million, and imposing a four-level upward adjustment based on the finding that he derived over $1,000,000 in gross proceeds from an offense which affected a financial institution.[7]

The District Court calculated the $80 million sum by adding Bank of America's loss of $75,215,510 in the revolving loan agreement to the $43 million loss to investors after Suprema declared bankruptcy just months after the 2001 stock offering. The District Court stated that, because it could safely assume that at least $5 million of the loss to investors was caused by defendants' unlawful conduct, it did not need "to engage in anything resembling analysis of loss causation as might be required in civil [10b-5] litigation." Supp.App. at 4417.

Cocchiola does not dispute the amount of loss, but rather the portion of that loss which is attributable to criminal acts. He argues "[o]nly money the banks lost from the portions of loans which were fraudulently obtained should have been used to

[7] The District Court sentenced both defendants under the 1998 version of the Guidelines under this court's decision in *United States v. Bertoli*, 40 F.3d 1384, 1404 (3d Cir.1994). That decision is not at issue on this appeal. Accordingly, all citations to the Guidelines in this opinion are to the 1998 Manual.

determine the upward adjustment for loss under U.S.S.G. § 2F1.1(b)(1)" and "only that portion of the loss which was 'unlawfully taken' may be used to determine the offense level. . . ." Cocchiola Br. at 54, 57. We disagree.

The banks' net loss was undisputedly over $75 million in the loan transaction, and there is evidence that the banks would not have provided loans to Suprema but for the fraudulent activity. Cocchiola asserts that "there was no evidence concerning how much of that $75 million actually involved money that had been 'unlawfully taken.'" Cocchiola Br. at 52-53. Even assuming that Suprema entered into the revolving loan agreement before fraudulent activity began, the fraud went on for approximately eight years. Cocchiola offered no information by which the District Court could decipher what part of the $75 million was attributable to legitimately induced loans. Accordingly, under the Sentencing Guidelines, the District Court's loss calculation was not error. *See* U.S.S.G. § 2F1.1 cmt. n. 9 (stating that, for offenses involving fraud, "the loss need not be determined with precision. . . . [t]he court need only make a reasonable estimate of the loss, *given the available information.*") (emphasis added).

As for the $43 million securities loss, the District Court was correct to conclude that the 2001 stock offering would never have occurred but for the fraud. Mitchell Pinheiro, an executive at Janney Montgomery, the investment firm which underwrote that stock offering, testified that his firm "would not have

performed the underwriting for" Suprema in 2001 had it known of the fraud. Supp.App. at 568.

Finally, Cocchiola argues that his sentence was too harsh because he did not derive more than $1 million in gross receipts from his offense, as some of the proceeds were not "attributable to the fraud." Cocchiola Br. at 62. The definition of "gross receipts from the offense" under U.S.S.G. § 2F1.1(b)(7)(B) "applies 'even if the defendant receives the million dollars in an indirect manner.'" *United States v. Bennett*, 161 F.3d 171, 192 (3d Cir.1998) (quoting *United States v. Monus*, 128 F.3d 376, 397 (6th Cir.1997)).

Cocchiola collected $2.5 million from the sale of Suprema stock, the price of which was enhanced by bank fraud. Moreover, he received a salary of $250,000 per year for fiscal years 1999-2001 and bonuses totaling over $1.5 million for those years, all from a company that was supported largely by illegal loans. Cocchiola seems to argue that the District Court was required to parse each of his gross receipts to determine its precise source. He cited and we found no decisions requiring as much.

III.

For the above-stated reasons, we will affirm the District Court's judgments and sentence.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1976

UNITED STATES OF AMERICA

v.

MARK COCCHIOLA,

Appellant

No. 08-2116

UNITED STATES OF AMERICA

v.

STEVEN VENECHANOS,

Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and WEIS*, *Circuit Judges*

The petition for rehearing filed by Appellant, Mark Cocchiola, in the above-entitled cases having

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* Hon. Joseph F. Weis, Jr., Senior Judge, United States Court of Appeals for Third Circuit Court, as to panel rehearing only.

been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: February 3, 2010
par/cc: G.S.L., Esq.
J.F.R., Esq.
J.H.F., Esq.
P.G., Esq.
S.G., Esq.